90-1506

Supreme Court, U.S.
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No.

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a presumption of reprisal should be created upon proof that an employee was denied placement in a position in lieu of separation reasonably soon after she was identified by management as the "ringleader" of a "women's lib" Title VII suit, or whether the prima facie case include proof that either there was no hiring freeze or the necessary exemption was obtained?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kathleen Shetler Globus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. p. 1a) is unreported. The main opinion of the district court (Revercomb,

D.J.) (App. 4a) is reported at 721 F.Supp. 329. The district court's order denying a motion for reconsideration (App. 33a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 1a) was entered on August 13, 1990, and a petition for rehearing was denied on November 30, 1990 (App. 44a). On February 15, 1991, Chief Justice Rehnquist extended the time for filing this petition to March 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

> 42 U.S.C. § 2000e-3(a). It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an

> unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
>
> 42 U.S.C. § 2000e-16(a) All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. *Introduction*. This petition is filed because the District of Columbia Circuit, in conflict with most of the other circuits, requires Title VII reprisal plaintiffs in certain types of cases to proof more facts than are necessary to justify a presumption of reprisal.

the plaintiff, Ms. Shetler[1], met the standards for creating a presumption that her reduction in force separation in 1983 was an act of reprisal for her being, in agency management's words, the "ringleader" behind a "women's lib" Title VII class action suit, the court found this presumption did not extend to the decision to not offer Ms. Shetler a particular vacancy in lieu of separation. In conflict with the rule followed in every circuit but the District of Columbia and the Eleventh, the courts below held that the prima facie case as to this decision included proof of the same job-related elements as are contained in the ordinary sex or race discrimination prima facie case. The courts accepted

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[1] As noted in the district court opinion, plaintiff used her maiden name, "Shetler," while working for the agency, and that appellation was reflected in the various exhibits and the trial testimony. App. 5a n. 1. For convenience, it is continued to be used here.

the agency's argument that this meant Ms. Shetler had to prove that there had been exemption requested to a facially inapplicable hiring freeze, that she had failed to adequately do so[2], and thus was not entitled to judgment even in the absence of an articulated reason for not offering her the job.[3]

Certiorari review is sought because the D.C. Circuit rule, followed by the

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[2] Ms. Shetler's evidence on the point was limited to showing that neither of the hiring freezes identified in the record applied to offering vacancies in lieu of reduction in force separation, that the agency had a policy of offering vacancies in lieu of reduction in force separation notwithstanding the purported freezes, and that twelve of her colleagues (who had not been repeatedly denounced by top management as women's lib litigation ringleaders) had been offered vacancies without any evidence of freeze exemptions having been obtained.

[3] The district court did, alternatively, find the agency had articulated legitimately reasons for not offering Ms. Shetler the position. App. 41a-42a, discussed below. These were generally left undefended at the court of appeals, which limited its affirmance to the sole ground of failure "to establish a prima facie case concerning the availability of such a position." App. 1a.

courts below, conflicts with the rule followed in the other circuits, and fails to reflect a proper understanding of the nature and role of presumptions in Title VII litigation. We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 29 *et seq.*, below). First, however, we briefly describe the findings and conclusions of the courts below.

2. *The District Court's Findings.* Ms. Shetler was removed in a reduction in force in 1983 from her GS 13 position in the Maritime Administration ("Marad"). An administrative claim before the Merit Systems Protection Board that the separation was a reprisal for earlier activity protected by Title VII was unsuccessful,[4]

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[4] Reprisal against a federal employee for exercising Title VII rights is itself a Title VII vi-

and Ms. Shetler exercised her right to a trial de novo in the District Court. 5 U.S.C. § 7703(b)(2); 42 U.S.C. § 2000e-16(c).

The court found that Ms. Shetler's supervisor regarded her as a productive employee of the Office of Maritime Labor and Training and had consistently rated her highly,[5] App. 17a; that she had been involved in class action Title VII litigation charging systematic race and sex discrimination by the Maritime Administration, App. 5a; and that her case centered around the "alleged animus toward her by Mr. Russell Stryker,

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olation. *Smith v. Horner*, 846 F.2d 1521, 1524 (D.C.Cir. 1988).

[5] Mr. Arthur Friedberg, the head of that office, testified specifically that Ms. Shetler was a valued member of his staff, that her removal was not a matter of getting rid of a useless function, and that her performance was always better than satisfactory--i.e., it was commendable or outstanding. App. 49a-50a.

associate administrator for policy and administration, who reported to Admiral Shear, administrator of Marad." App. 5a.

A few months after trial in the class action, the duties of one of Ms. Shetler's colleagues were eliminated and, simultaneously, the office's ceiling was reduced by one. App. 8a. To accommodate the ceiling reduction, Ms. Shetler's position (rather than the position which no longer had any duties) was abolished. App. 7a-8a. A GS 6 typing position was vacant in another office, and Ms. Shetler was offered it in lieu of separation. App. 52a. She accepted the offer, App. 52a, but shortly before the RIF effective date one of her office colleagues unexpectedly resigned, bringing the office down to ceiling by attrition, and the

abolition of Ms. Shetler's position was therefore cancelled. App. 9a.

The 1983 RIF was set in motion several months later, prior to the final decision in the class action. App. 63a. A decision was made to reduce the agency's employment from 1,054 in early 1983 to ceiling to 993 effective October 1, 1983. App. 9a. Although attrition actually brought employment down to 994 by the end of June of that year, App. 63a, Ms. Shetler's position and those of several other employees were nevertheless abolished. The consequence of going through with the reduction in force was that the agency reached October 1, 1983, with 956 employees and over 30 vacancies. App. 63a. Ms. Shetler's claim is that the failure to offer her one of those vacancies, specifically, a position in the clerical reserve pool, was an act of

reprisal for her activity in support of the earlier class action litigation.

a) Prima facie case of reprisal in decision of grudge-holding manager to separate whom he characterized as "ring-leader" of "women's lib" class action.

The court found that Ms. Shetler had made out a prima facie case of reprisal in her separation based on the temporal proximity of her protected activities and decisions adverse to her, evaluated in light of the substantial direct evidence of reprisal animosity on the part of Mr. Russell Stryker:

> [T]he Court concludes that the plaintiff succeeded in making out a prima facie case of retaliation. . . . [I]t is notable that the plaintiff was first told that she would be laid off in the 1982 RIF only a few months after the trial in Harrison, even though this no-

> tification was later cancelled. Because the date of the first RIF certainly was close enough to make out a prima facie case of retaliation, the Court believes that the fact the plaintiff was laid off in the next RIF also is enough to establish a prima facie case.
>
> * * *
>
> Finally, the plaintiff helps prove a prima facie case of discrimination by citing negative comments by Mr. Stryker and Mr. Friedberg regarding EEO activities. Although the officials did not take any adverse action against the plaintiff when they made the comments, the statements themselves help connect the plaintiff's EEO activity and her dismissal enough to help establish a prima facie case.

App. 27a-29a.

As the court noted, Mr. Stryker was not only upset by Ms. Shetler's leadership in the class action litigation, but he took the trouble to complain about her both to her supervisor and at his own weekly senior staff meetings:

> The plaintiff and other witnesses testified that Mr. Stryker was displeased with Ms. Shetler's EEO activities and about the **Harrison** litigation in generally. He occasionally made unfavorable comments about her to her supervisor and often mentioned her at weekly staff meetings during the **Harrison** litigation.

App. 6a.

What specifically Mr. Stryker repeatedly said to his senior staff (who included both the personnel director and Mr. Jack Mann, the official whom the agency identifies as having made the decision not to offer Ms. Shetler the vacancy at issue here[6]), was that the **Harrison** litigation was a "women's lib" project, and that Ms. Shetler was its "ringleader." App. 46a-48a.

The evidence established, moreover, that Mr. Stryker was willing, if neces-

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[6] "[T]he decision whether to fill a vacant position lay . . . with Jack Mann, the manager who had the vacancy." App. 64a.

sary, to await a propitious moment to get back at those he deemed his enemies:

> QUESTION: Do you know the extent to which Mr. Stryker would quickly forgive his enemies or forget the grounds of animosity?
>
> CAPT. WHITCHER: To the best of my knowledge, he never forgave anybody anything.
>
> * * *
>
> THE COURT: He said he didn't think that he would ever forgive anybody for anything they did adverse to him. He held a grudge a long time, I guess.

App. 46a.

Indeed, the agency does not dispute that, in violation of the Age Discrimination in Employment Act, Mr. Stryker used the same 1983 RIF to oust an older manager and replace him with Mr. Mann.[7] Pl.Exh. 475 at 142.

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[7] It was also undisputed that Mr. Stryker involved himself in personnel decisions of his managerial subordinates, even as to the filling of clerical positions. App. 48a-49a.

b) Ms. Shetler could not have been separated but for the decision to not offer her a vacancy.

Ms. Shetler's complaint was that she had been separated as an act of reprisal for her protected Title VII activities. Throughout the litigation, both parties recognized that the abolition of Ms. Shetler's position was not sufficient to accomplish this end.[8] The complicated reduction in force procedures in the federal civil service, 5 C.F.R. Part 351 (1983), have the effect of eliminating any one-to-one correspondence between an

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[8] The court concluded that the agency rebutted the presumption that the overall reduction in force, the reduction in the ceiling in Ms. Shetler's office, and the abolition of Ms. Shetler's position were motivated by reprisal, by providing testimony of non-retaliatory reasons for each of these decisions. App. 30a. The court concluded, further, that Ms. Shetler did not prove these articulated reasons to be unworthy of credence. App. 30a. The court's errors on these points are not subject to this petition.

employee's position being abolished and his or her being separated; through arcane "bumping" and "retreating" procedures, it may well be that employee Smith's position is abolished but employee Jones goes out the door (with Smith taking the Jones position). In addition, and central to the present case, the civil service regulations allow, but do not require, an agency to offer vacancies in lieu of separation to employees whose positions have been abolished, 5 C.F.R. § 351.201(b) (1983). That is, the decision whether to offer a vacancy in lieu of separation stands on the same ground as the decision whether to abolish a position: it lies within the sole discretion of the agency, unconstrained by civil service regulations, but subject to Title VII requirements that the decision

not be made for discriminatory or reprisal reasons.[9]

Thus, abolishing Ms. Shetler's position would not result in her being separated unless either (a) there was no vacant position which she could be offered or (b) the agency exercised its discretion to not offer her to an otherwise available position. This discretion could be exercised either by a blanket policy for or against offering vacancies, or by case by case exceptions to a general policy. In the RIF affecting Ms. Shetler, the Maritime Administration had adopted a policy of offering vacancies to

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[9] If the decision were not within the agency's discretion, that is, if the civil service regulations either barred or required offers of vacancies, Title VII could not be involved. If the agency failed to offer a vacancy, but such an offer would violate the RIF regulations, Title VII would not be violated. If the agency failed to offer a vacancy even though the particular offer was mandated by RIF regulations, the employee would have a complete remedy without having to prove illegal animus.

qualified[10] employees whose jobs were abolished:

> PLAINTIFF'S FOURTH INTERROGATORY No. 20(a): In the 1982 or 1983 reduction in force was any employee offered a vacancy even though he or she had not been determined to be entitled to displace an employee at or below the grade of that vacancy?
>
> RESPONSE: Yes. It is MarAd's policy to offer authorized vacancies to employees whose positions would be affected by RIF, provided they meet the qualifications requirements for those vacancies.

App. 59a.

Among the twelve of Ms. Shetler's headquarters colleagues who were offered vacancies in the 1983 RIF were Mr. John Faruki, a GS 14 who was offered a GS 4

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[10] Ms. Shetler had been offered a typing vacancy in 1982, in lieu of separation, only upon the personnel director's express finding that she was qualified for clerical jobs. App. 51a-52a. Moreover, under civil service regulations, qualifications requirements can be waived when considering employees for vacancies in lieu of separation. App. 50a.

clerk-typist position, Rona LaPrade, a GS 12 who was offered a GS 6 secretary (typing) position, and Alvin Foltz, a GS 12 who was offered a GS 4 clerk-typist position. App. 61a.

c) Determination by district court that Ms. Shetler's prima facie case failed for lack of proof that the concededly existent position was "available."

The court concluded that Ms. Shetler failed to make out a prima facie case of reprisal in failing to be offered a vacancy because she had failed to prove the availability of the clerical position in question:

> There is no evidence that such a clerical position was available. Plaintiff points only to the general testimony that one of the four clerical positions

> exempt from the 1983 RIF was vacant at the time of plaintiff's termination. Plaintiff then asks the court to "infer that the [defendant's] office had determined that the vacancy was going to be filled." The Court will not indulge plaintiff in this inference. Ms. Globus and her counsel had the opportunity to develop direct testimony regarding the alleged vacancy at trial. In the absence of such evidence, this Court will not "infer" an essential element of plaintiff's case after trial.

App. 40a-41a (footnote omitted).

d) Although a vacancy concededly existed, "availability" was defined as depending on whether an exemption from a hiring freeze was necessary and had been obtained.

The agency freely admitted that among the more than 30 vacancies which existed concurrent with the RIF was the clerical job in dispute here:

> [T]he existence of a clerical vacancy is uncontradicted . . .

App. 64a.

What the agency explained was that the clerical vacancy in question was not available, within the meaning of its policy to offer vacancies in lieu of separation, because Ms. Shetler had failed to prove that an exemption from an alleged hiring freeze had been obtained in order to fill it[11]:

> Although the existence of a clerical vacancy is uncontradicted, at least four other points, critical to appellant's case were in dispute: 1) whether MARAD requested an exemption from the hiring freeze to fill the position; . . .

App. 64a.

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[11] The agency identified the following additional points as being in dispute: "2) whether appellant was a qualified typist; 3) whether appellant was entitled to the position; 4) whether the failure to offer appellant the position was due to an illegal, retaliatory motive." App. 64a.

The trial record did contain two distinct personnel freezes. One, dated April 16, 1982, was entitled "Civilian Hiring Freeze." App. 62a. On its face it only barred "hires of persons from outside [Department of Transportation]," and it specifically excluded "Personnel actions resulting in the movement of employees within the Department." App. 62a. The effect of this freeze was to reserve vacancies for those, like Ms. Shetler, who were already inside the agency, unless Marad obtained a departmental exemption in order to recruit from the outside.

The other freeze, which went into effect July 1, 1983 was expressly designed to facilitate, rather than restrict, the filling of vacancies by current employees whose own positions were being abolished:

> A personnel action freeze was implemented on July 1, 1983. Vacancies could not be filled after that date unless employees who were scheduled to be affected by RIF were selected for those vacancies. There were successful placements; for example, Code 500 agreed to make offers to vacant positions to 4 employees who would have either bumped other employees or who would have been separated by RIF. Other vacancies were filled in the same manner. . . .
>
> We continue to make . . . every effort to place affected employees within MARAD.

App. 60a.

e) Lack of evidence that any exemptions were requested from any hiring freeze in order to offer vacancies to employees affected by the RIF.

There is no doubt that twelve of Ms. Shetler's headquarters colleagues were offered vacancies during the 1983 RIF (including three offers involving demo-

tions comparable to that sought by Ms. Shetler):

		vacancy offered]
GS-9	Thomas, P.	GS-7 Secty (Steno)
GS-11	Bryant, Memphis	GS-8 Trade Route Asst
GS-14	Ledbetter, Roscoe	GS-13 Contract Spec
GS-7	Higbee, Ann	GS-6 Secty-typing
GS-7	Watson, Carol	GS-5 Accountant
GS-6	Hawkins, Beverly	GS-6
GS-4	Byers, Cheryl	GS-4 Clerk-typist
GS 9	Isaac, Joyce	GS-6 Secty (Steno)
GS 12	Foltz, Alvin	GS 4 Clerk Typist
GS 7	Washington, Y	GS 6 Subs Rate Asst
GS 12	Laprade, Rona	GS 6 Secty (Typing)
GS-14	Faruki, John	GS-4 Clerk Typist

App. 61a.

As with the position claimed by Ms. Shetler, with respect to each of these vacancy offers there is no evidence one way or the other "whether MARAD requested an exemption from the hiring freeze to fill the position," App. 64a. In accepting the agency's claim Ms. Shetler had failed to prove the availability of the clerical reserve pool vacancy, however, the courts below, accepted the agency's argument that proof of exemption from the hiring freeze was essential.

f) Alternative findings -- rejected by court of appeals -- that prima facie case was rebutted by reasons in fact never articulated by the agency.

Alternative to the finding that Ms. Shetler's prima facie case depended on

proof that an exemption to a facially-nonapplicable freeze had been obtained, the district court held that the agency had articulated three reasons for failing to offer the job and that Ms. Shetler had failed to discredit any of them:

> [E]ven if plaintiff had succeeded in establishing a prima facie case, plaintiff has not proved that defendant's reasons for failing to offer plaintiff a clerical position were merely pretextual. . . . [A]s all parties agree, defendant had no obligation to offer plaintiff another position. Defendant reasonably believed that plaintiff would not accept a lower clerical position since she had previously rejected a similar demotion when faced with termination resulting from a reduction in force in 1982. Defendant also introduced testimony that indicating that demotion of a relatively high level employee, such as plaintiff, to the level of GS 6 would create obvious managerial problems.

App. 34a.

Only the first of these was defended by the agency on appeal, it having been

the reason which the agency's pre-trial submissions had indicated would be testified to. As it happened, however, that testimony was never offered.[12]

The other alternative explanations were so bizarre that they were abandoned by the agency on appeal.[13] There had been no testimony, nor any other evidence whatsoever, regarding problems that substantial demotions might imply; other than the fact that other employees, i.e., employees not denounced by the Mr.

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[12] As this Court has emphasized, a presumption can be rebutted only by evidence actually admitted at trial, not by statements of counsel:

> An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n. 9 (1981).

[13] As will be seen, the court of appeals declined to consider them when affirming the court's judgment. Below, p. 27-8.

Stryker as the women's lib lawsuit ringleader, were offered substantial demotions in lieu of separation,[14] the question never arose in any manner or form before, during, or after the trial. And, although Ms. Shetler had indeed been offered a demotion to a clerical position when faced with termination in 1982, she had accepted the offer, not rejected it.

3. *Court of Appeals decision.*

Ms. Shetler noted an appeal, but before briefing was scheduled the agency filed a motion for summary affirmance. The motion was granted by a short, per curiam, unpublished order.[15] The court

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[14] It should be noted that such demotion carried no loss of pay, 5 U.S.C. §§ 5362, 5363, and that by the time of the trial in this case every single employee who had been demoted in the RIF had been re-promoted to his or her former grade.

[15] This Court has no policy against reviewing unpublished or summary court of appeals decisions. Transamerican Freight v. Brada Miller, 423 U.S. 28, 34, 46 L.E.2d 169 (1975); Lego v.

affirmed on the sole ground that Ms. Shetler had failed to prove the availability of the position:

> ORDERED that the motion [for summary affirmance] be granted substantially for the reasons stated by the district court in its Findings of Fact and Conclusions of Law, filed September 13, 1989, and Order, filed November 29, 1989. . . . We affirm the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separation solely on the ground that appellant failed to establish a prima facie case concerning the availability of such a position. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

App. 1a.

A petition for rehearing was denied, App. 3a, and a suggestion for rehearing en banc was declined.

In essence, the agency's position, endorsed by the courts below, is that the

presumption that the agency acted for reprisal reasons in separating Ms. Shetler did not apply to the decision to not offer her an authorized vacancy because--as to this portion of the decision to separate--the plaintiff's prima facie case includes proving that the identified authorized vacancy has been exempted from a hiring freeze which is facially inapplicable to it.

REASONS FOR GRANTING THE PETITION

The courts below resolved erroneously a question of great importance to the administration of anti-discrimination laws, in conflict with the decisions of other courts of appeals, and inconsistent with this Court's Title VII and presumptions jurisprudence.

In a series of Title VII discrimination cases, this Court judicially created a rebuttable mandatory presumption[16] of discrimination upon the proof of a set of facts--a prima facie case--whether or not the trier of fact would necessarily infer

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[16] Technically, "mandatory rebuttable presumption" is redundant. By definition, an ordinary presumption is mandatory and rebuttable. What is referred to as a "presumption of law," is irrebuttable. On the other hand, if the effect of the evidence is nothing more than that the jury is allowed to infer the fact in issue, there is an inference but not a presumption.

discrimination from those facts. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This Court has not, however, ever addressed whether such a presumption can be created in a Title VII reprisal case.[17] As will be shown, this Court's Title VII jurisprudence clearly demands recognition of a reprisal presumption and clearly what the elements of a prima facie case of reprisal should be.

The District of Columbia Circuit and the Eleventh Circuit allow presumptions to be created in reprisal cases, but take an idiosyncratic view of the elements of the prima facie case, adding to the stan-

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[17] This is not surprising: "[B]ecause of irregular fortuity in presentation of presumption cases to the top court, there are quite sure at all times to be important and embarrassing gaps even as to well established presumptions in any classification schemes." Maguire, *Evidence, Common Sense and Common Law*, 188 (1947).

dard reprisal elements the elements of what would be a prima facie case of simple race or sex discrimination. In addition, a few decisions scattered among the circuits effectively reject the possibility of a presumption of reprisal at all, holding that the employer has nothing to rebut unless the plaintiff actually convinces the trier of fact that reprisal was the employer's motive. Thus, how allegations of Title VII reprisals are litigated is determined both geographically and by the luck of circuit court panel appointments.

Ms. Shetler's evidence established a prima facie case of reprisal as defined by most panels in every circuit but two. This arbitrary distinction is unnecessary and, by this Court, easily correctable. It should be corrected because the confusion not only increases the

likelihood of erroneous decision-making, but wastes the time, attention, and efforts of the participants (litigants and courts)[18] in a substantial area of federal litigation.[19]

A. The Conflict Among The Circuits Requires Resolution By This Court.

All twelve of the geographical circuits[20] say that reprisal cases are governed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas*

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[18] "Each party and the court must know where [the burden of introducing evidence] rests ar every stage of the trial . . . " Morgan, *Tot v. United States: Constitutional Restrictions on Statutory Presumptions*, 56 Harv. Law Rev. 1324, 1325 (1943).

[19] Between 1984 and 1988, around 9,000 employment discrimination cases a year were filed in the federal district courts. *Annual Report of the Director of the Administrative Office of the United States Courts, 1988*, 185.

[20] The U.S. Court of Appeals for the Federal Circuit has jurisdiction over a range of federal government employment cases, but those involving Title VII are expressly excluded from that jurisdiction. 5 U.S.C. § 7703(b)(2).

Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). All go on to recite that the plaintiff is to prove certain facts--the prima facie case; then the defendant must rebut that case by introducing evidence of a legitimate non-reprisal reason for its decision; and then the plaintiff has an opportunity to prevail by showing the articulated reason to be unworthy of credence. The circuits are unanimous in reciting that the elements of a reprisal prima facie case are that the plaintiff prove (1) that she engaged in protected activity, (2) that she suffered an adverse employment decision, and (3) that there is a causal connection between the two.[21] In practice, however, three radically different approaches are followed. First, in the majority of

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[21] This formula seems to have originated with *Hochstadt v. Worcester Foundation, Etc.*, 425 F.Supp. 318, 324 (D.Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976).

cases, the courts (correctly) find prima facie reprisal upon proof that the employee engaged in protected activity, the employer knew of the activity, and the employer made an adverse personnel decision within a short enough time that anger at the employee's actions would not have been completely attenuated.

Secondly, the District of Columbia Circuit and the Eleventh Circuit define the prima facie case by adding to the basic reprisal formula the elements of the simple discrimination prima facie case (other than membership in a protected group). *Williams v. Boorstin*, 663 F.2d 109, 116-17 (D.C.Cir. 1980); *Mitchell v. Baldridge*, 759 F.2d 80, 86 n. 5 (D.C.Cir. 1985); *Canino v. United States EEOC*, 707 F.2d 468 (11th Cir. 1983); and the present case. Where, as here, the reprisal was the failure to offer the plaintiff a

position, those elements are proof that the position claimed by the plaintiff was truly available and that the plaintiff was qualified for the position.

Finally, scattered through the circuits are decisions holding that a prima facie case of reprisal depends on the trier of fact, in the particular case in dispute, determining that in fact reprisal was the employer's motivation. *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986); *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985). This line of cases does not recognize the creation of a presumption within the meaning of *McDonnell Douglas* and *Burdine*.

1. *Most circuit court decisions define the reprisal prima facie case based only on the temporal relationship between protected activity and adverse personnel decision, without adding the elements of an analogous simple discrimination case.*

In a case of simple discrimination (i.e, race discrimination, without any reprisal claim) in hiring, the prima facie case consists of proof: that the plaintiff belongs to a racial minority; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's

qualifications. *McDonnell Douglas*, 411 U.S. at 802.

In reprisal cases, on the other hand, the usual standard for finding a prima facie case is for the plaintiff to prove protected activity and adverse personnel decision, and then to prove, in the name of causality, that the employer was aware of her activity and decided adverse to her reasonably soon after the activity:

> Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected activity and the allegedly retaliatory employment decision. *Miller* [*v.Fairfield Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986)] at 731-32.

Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

Indeed, every circuit has issued decisions holding that a presumption of reprisal is created by an adverse personnel decision following protected activity that the employer was aware of.[22]

Outside the District of Columbia and Eleventh Circuits, job-related issues (e.g., the plaintiff's qualifications for the job and whether the employer in fact intended to fill the vacancy in the first place) are addressed after the prima facie case of reprisal is established, as part of the employer's rebuttal and the employee's attack on that rebuttal.

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[22] *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 (1st Cir. 1989); *Davis v. State Univ. of New York*, 802 F.2d 638 (2nd Cir. 1986); *Waddell v. Small Tube*, 799 F.2d 69 (3rd Cir. 1986); *Williams v. Cerberonics*, 871 F.2d 452 (4th Cir. 1989); *Payne v. McLemore's*, 654 F.2d 1130 (5th Cir. 1981); *Polk v. Yellow Freight*, 876 F.2d 527 (6th Cir. 1989); *Jennings v. Tinley Park*, 796 F.2d 962 (7th Cir. 1986); *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980); *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *Simmons v. Camden Country Bd. of Educ.*, 757 F.2d 1187 (11th Cir. 1985); and *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

Holland v. Jefferson Nat. Life Ins. Co., 883 F.2d 1307, 1316 (7th Cir. 1989), and *Gonzalez v. Carlin*, 907 F.2d 573 (5th Cir. 1990).

Indeed, outside the D.C. and 11th Circuits, the courts seem to make a point of emphasizing that if a single personnel decision is attacked as both an act of discrimination and an act of reprisal, the two issues are analyzed using differing (and non-overlapping) prima facie cases. *Davis v. Lambert of Arkansas, Inc.*, 781 F.3d 658 (8th Cir. 1986); *Jalil v. Avdel Corp.*, 873 F.2d 710 (3rd Cir. 1989); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied* 455 U.S. 1000; *Gonzalez v. Carlin*, 907 F.2d 573 (5th Cir. 1990); and *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28 (1st Cir. 1990).

Thus, it is settled throughout most of the circuits that the issue which was central to Ms. Shetler's case--whether the vacancy she claimed was truly available--is considered as part of the employer's rebuttal rather than the plaintiff's prima facie case.

2. *The District of Columbia and Eleventh Circuits require proof of the elements of a simple discrimination case as part of the prima facie case of reprisal.*

The rule in the District of Columbia Circuit and the Eleventh Circuit is that a prima facie case of reprisal regarding a decision concerning a particular position does not arise unless the plaintiff proves he or she was qualified for it:

> In cases of alleged retaliatory discharge, failure to hire, or failure to promote, the plain-

> tiff must also show as part of the prima facie case that he was qualified for the position. *Williams v. Boorstin*, 663 F.2d 109, 16-17 (D.C.Cir. 1980); *see also Canino v. United States EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983).

Mitchell v. Baldridge, 759 F.2d 80, 86 n. 5.

We do not dispute that the rule identified in *Mitchell* applies to all aspects of the prima facie case--in our case, it applies to job availability as well as qualifications for the job. The problem is that the *Mitchell* rule is out of line with the approach generally followed in the other circuits. It is this conflict which should be resolved by the Court, particularly because, as will be shown below, the D.C. Circuit rule is wrong.

3. *A significant number of circuit court panels effectively deny any presumption in reprisal cases at all.*

In both the Seventh and the Ninth Circuits there are lines of cases interpreting "prima facie case" as meaning proof that actually convinces the trier of fact that reprisal was one of the reasons for the employer's decision. Thus, one Seventh Circuit case says the plaintiff must satisfy the trier of fact that but for the alleged reprisal he or she would not have been subjected to the challenged employment decision:[23]

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[23] Satisfying the trier that in fact the employer would not have taken the adverse action but for a reprisal motivation does not create a presumption of reprisal, subject to rebuttal by an articulated non-reprisal reason; it establishes the fact of reprisal, entitling the plaintiff to judgment unless the employer succeeds in proving (by a preponderance of the evidence) that it would have made the same adverse decision even absent the reprisal motivation. *Price Waterhouse v. Hopkinss*, 104 L.Ed.2d 268 (1989).

> To establish a *prima facie* case of retaliatory discharge . . . the plaintiff must show: (1) he opposed an employment practice that was unlawful within the meaning of Title VII or he participated in a proceeding under Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation. *See Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). The plaintiff must show that the employer would not have taken the adverse action "but for" his opposition or participation. *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 928 (7th Cir. 1984). Successfully establishing a *prima facie* case gives rise to a rebuttable presumption of discrimination.

Klein v. Trustees of Indiana University, 766 F.2d 275 (7th Cir. 1985)

A leading Ninth Circuit case similarly requires proof by a preponderance of the evidence that but for reprisal there would not have been a discharge, before the defendant has any burden of proof or production:

> In this circuit, retaliation claims have arisen most often in the context of an employee's termination, and the causation element in those cases requires the plaintiff to show "by a preponderance of the evidence that engaging in a protected activity was one of the reasons for the firing and that but for such activity the plaintiff would not have been fired." *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 345 (9th Cir. 1982).

Ruggles v. California Polytechnic State University, 797 F.2d 782 (9th Cir. 1986).

As will be discussed in Part C, below, what this Court did in *McDonnell Douglas* and *Burdine* is create what is academically referred to as a "true presumption," one which shifts the burden of production of evidence (without affecting the burden of proof) upon the plaintiff's establishing certain facts, whether or not the trier of fact would infer the ultimate fact from them. The *Klein-Ruggles* line of cases -- whether rightly or wrongly decided -- are not recognizing

true presumptions in reprisal cases, as do the other cases cited above. Instead, they require reprisal plaintiffs to somehow[24] prove facts sufficient to bring their cases within the ambit of *Price Waterhouse v. Hopkins*, 104 L.Ed.2d 268 (1989), with the trier of fact accepting that reprisal was one motivation and that the employer's articulated reason was another and then determining whether the articulated reason would have resulted in the adverse decision even absent the reprisal reason.

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[24] This could most likely succeed where, as here, there is direct evidence of employer anger at the employee's protected activity.

B. Determination of the elements of the prima facie case is necessary even though the case was fully tried, because the employer declined to provide evidence of any legitimate reason but the court refused to presume reprisal animus from the plaintiff's evidence.

An important preliminary question must be addressed, which is how can the question of prima facie case be presented once the case has been fully tried? As this Court has emphasized, at that point the simple question of discrimination or legitimate motives should be decidable. *U.S. Postal Service v. Aikens*, 460 U.S. 711, 716 (1983)

The *Aikens* court did not have before it the situation presented here--with the employer declining to introduce evidence of any nondiscriminatory reason, but the

court refusing to honor the presumption created by the plaintiff's evidence. Here, in contrast to the case in *Aikens*, the decision depends solely on whether the plaintiff's evidence does or does not create a legally binding presumption. If the evidence was sufficient, Ms. Shetler was entitled to judgment despite the district court's honest belief that there must have been some legitimate reason for deciding not to offer her a vacancy in lieu of separation:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254 (footnote omitted).

That presumption is dissipated only by the introduction, through evidence at trial, of the employer's claimed reason, *ibid*. Nothing in *Aikens* suggests that the defendant's mere participation in the trial destroys the legally mandatory inference of discrimination. It is only when "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case," *Aikens*, 460 U.S. at 716, that is, when the defendant has actually "set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 255, that the district court is free to choose between the plaintiff's explanation and whatever non-discriminatory explanations the defendant argues or (as here) appear *sua sponte* to the court.

C. Title VII Policy Dictates Creation Of A Presumption Of Reprisal When Adverse Personnel Decisions Are Made Reasonably Soon After Participation In Protected Activities.

Whether Ms. Shetler's evidence should have created a presumption of reprisal in failing to offer her the position in the clerical reserve pool depends mainly on what a presumption is, and what purposes is serves--a subject notorious for its complexity:

> It has been aptly observed that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." . . . The lawyer must still grapple with complexities, intricacies and confusions that have enshrouded the subject for generations.

Louisell, *Federal Evidence* § 65 at p. 518 (1977) (footnotes omitted).

At this point, it may suffice to note the three common meanings given the term "presumption," and to stress that what we are concerned with is the mandatory rebuttable type, the presumption which merely shifts the burden of producing evidence. The other two uses of the term must be distinguished from the presumption considered here. The first is,

> the presumption of law, or conclusive or irrebuttable presumption. If *A* is shown, then *B* is to be presumed without question and the court will not even receive evidence or entertain argument to show the nonexistence of *B*. And the court will direct a jury that if they find *A* to be proven they *must* also find *B*. . . .

F. James & G. Hazard, *Civil Procedure* § 7.9 at 253-4 (2nd Ed. 1977.

At the opposite end of the scale are simple inferences, and the court's role in determining whether a jury can be allowed to make a particular inference:

> The word "presumption" is occasionally used to refer to the logical inference of one fact from the existence of another. . . . [C]ourts set limits to the drawing of inferences and will permit juries to draw only those which the courts consider rational.

Ibid., 254-5.

What concerns us here are presumptions of the type created by this Court in *McDonnell Douglas*, what the text authors refer to as true presumptions:

> The word "presumption" properly used refers only to a device for allocating the production burden. It operates thus: If *B* is presumed from *A*, then on a showing of *A*, *B must* be assumed by the trier in the absence of evidence of non-*B*. To put it another way, if *A* is shown, then the party who asserts non-*B* has the production burden on the issue of *B*'s existence or non-existence.

Ibid., 255.

"Prima facie case," in this context, means the evidence necessary to create the presumption, rather than, as in other

contexts, the evidence sufficient (absent a presumption) to resist a motion for directed verdict:

> The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Burdine, 450 at 254 n. 7.

Thus, in defining the prima facie case of reprisal this court is not setting out standards for judging what inferences are sustainable, but determining what evidence should be deemed sufficient so as to require the employer to state in evidence at trial what it contends the true reason for the challenged personnel decision is.

1. A presumption of reprisal should be created by evidence which is rationally connected to reprisal motivation, sufficient to protect employers from trial of frivolous cases, and which respects the relative conveniences in production of evidence.

The authority creating a presumption (in this case, a court) has broad discretion in identifying the elements of the prima facie case. There are, however, two extremes which must, or should, be avoided. In some cases, the elements of the prima facie case so clearly imply the presumed fact that to create a formal presumption is a waste of time:

> In *Hawes v. Georgia*, 258 U.S. 1, the . . . statute provided that when distilling apparatus was found on the premises this should be prima facie evidence

> that the person in actual possession had knowledge of its existence. . . . The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof.

Tot v. United States, 319 U.S. 463, 470-1 (1943).

On the other extreme, a presumption is not constitutionally permissible "if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot*, 319 U.S. at 467-8.

In sum, one would not create a presumption where the proven facts necessarily imply the ultimate fact, and one may not create a presumption where the proven facts have no logical relation at all with the ultimate fact. It is in the

broad space between these two poles that the decision is made as to exactly what facts should create the presumption. This is a policy decision, made in light of the other factors going into the creation of presumptions:

> What, then, are the bases upon which courts or legislatures will create presumptions? For the most part they are the same kind of reasons that influence the production burden generally, and these may be summed up as reasons of convenience, fairness, and policy.

F. James & G. Hazard, *Civil Procedure* § 7.9, p 256 (2nd Ed. 1977).

By definition, recognition of proof by way of presumption allows a plaintiff to present a discrimination case in the absence of direct evidence of discriminatory motive[25]; it would hardly make

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25 "The special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting *any* evidence that age was a determining factor in the employer's motivation." *La Montagne v. American*

sense to demand the equivalent of direct proof in order to make out a prima facie case. On the other hand, it can be easily conceded that the elements of a prima facie case must be sufficiently rigorous to indicate some difference between the case at bar and run-of-the-mill adverse personnel decisions:

> [T]he prima facie burden is a useful barrier that serves to screen out unsubstantiated discrimination charges. The employer is spared unnecessary litigation expense by its ability to file a motion to dismiss, a motion for summary judgment, or a motion for directed verdict where the plaintiff fails to distinguish his or her case from the ordinary, legitimate kind of adverse personnel decision . . .

Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 134 (7th Cir. 1985).

Convenience Products, Inc., 750 F.2d 1405, 1409-10 (7th Cir. 1984).

The final factor relevant[26] to determining the elements of a Title VII presumption is to ensure that, as nearly as possible consistent with the other criteria, the evidentiary burdens fairly reflect the relative access to information:

> Access to evidence is often the basis for creating a presumption. When goods are damaged in a bailee's possession, for instance, the bailee can more easily find out what happened to them than the bailor, so it is fair to presume the bailee's negligence as an initial matter and put to the production of exculpatory evidence if he has any. The owner of an automobile has been means of knowing whether the driver was in his service when it struck the plaintiff than has the plaintiff.

Harper & James, 257.

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26 Professor Morgan has identified a number of other reasons which have caused courts or legislatures to create or recognize presumptions, Morgan, *Basic Problems of Evidence*, 32-33 (1962), but none of these seems applicable to Title VII.

Thus, it is fair to state that a presumption of reprisal should arise from such evidence as would allow serious reprisal allegations to be distinguished from the frivolous, while at the same time allocating the evidence production burdens as nearly as possible consistent with the parties' relative convenience.

2. Placing the burden on the employer of proving impediments to filling a vacant position better serves the purposes of Title VII than does making disproof of impediments part of the plaintiff's prima facie case.

Both the formulation followed in most of the circuits and the formulation followed in D.C. and the 11th Circuit meet the first two criteria identified .

above--they allow plaintiffs to seriously present cases in the absence of direct evidence of reprisal motivation, and they protect employers from full-scale trials where the reprisal claim has no apparent basis.

The D.C. formulation requires that the plaintiff disprove hypothetical reasons for the employer's decision--in this case, that the plaintiff prove the reason was not the existence of a hiring freeze which barred the filling of the clerical vacancy. The majority formulation would disregard such reasons unless and until the employer itself presented some evidence that the alleged freeze was its true reason. It cannot be doubted that the majority formulation better reflects the access to the information as to the employer's true reason:

> [T]he employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof.

Teamsters v. United States, 431 U.S. 324, 359 n. 45 (1977).

To be sure, in simple discrimination cases, reasons related to available vacancies or the employer's evaluation of the applicant's qualifications are made part of the prima facie case. *McDonnell Douglas*, 450 U.S. at 802. But this allocation of proof is in spite of, not because of, estimates of convenience. In a simple discrimination case, the plaintiff must produce evidence directed at possible reasons for his or her rejection because absent that evidence no likelihood of discrimination would appear in the case at all:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [citation omitted]. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In a reprisal case, in contrast, the screening function is sufficiently performed by the reprisal-related elements--proof that the employee engaged in protected activities and the employer reasonably soon thereafter made an adverse

personnel decision. The job-related elements, essential to create a presumption of simple discrimination, are unnecessary to this purpose in a reprisal case. The majority of the circuits are, therefore, correct in treating questions such as job freezes and job qualifications as matters to be raised in the employer's rebuttal, rather than as elements of the plaintiff's prima facie case.

CONCLUSION

A writ of certiorari should be issued to the U.S. Court of Appeals for the District of Columbia circuit, bringing Ms. Shetler's case for review to this Court, so that the judicial confusion over the reprisal prima facie case can be resolved.

Respectfully submitted,

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90-1506

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5020 September Term, 1989
C.A. No. 85-01582

Filed Nov 30 1990
Constance L. Dupré
Clerk

KATHLEEN SHETLER GLOBUS,
Appellant

v.

SAMUEL K. SKINNER, et al.

BEFORE: Buckley, Sentelle and Thomas, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto and the reply, it is

ORDERED that the motion is granted substantially for the reasons stated by the district court in its Findings of Fact and Conclusions of Law, filed September 11, 1989, and Order, filed November 29, 1989. The merits of the parties positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam). We affirm the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separa-

tion solely on the ground that appellant failed to establish a prima facie case concerning the availability of such a position. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-3 (1981).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SHETLER GLOBUS, Plaintiff	)	
v.	)	Civil Action
No.	)	85-1582
SAMUEL SKINNER, Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves an allegation of unlawful retaliation against an employee for her antidiscrimination activities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Trial was held on April 6-11, 1989. In the findings of fact, the Court concludes that the defendant did not retaliate against the plaintiff and in the conclusions of law the Court finds in favor of the defendant.

I. Findings of Fact

The plaintiff, Kathleen Shetler Globus ("Ms. Shetler")[1], was hired in 1967 by the Maritime Administration (MarAd), an agency of the United States government.[2] She was promoted numerous times, achieving the grade of GS-13 in 1973. In 1977, Ms. Shetler was assigned to a position in the Office of Maritime Labor and Training, which was referred to as "Code 250." The head of the office was Mr. Arthur Friedberg.

During the 1970s and early 1980s, Ms. Shetler was involved in a number of equal employment opportunity ("EEO") ac-

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[1] During her employment at the Maritime Administration, the plaintiff was known as "Shetler" and she was referred to as "Shetler" during the trial. The Court will refer to her by this name in this memorandum.

[2] MarAd was within the Department of Commerce until 1980, when it was moved to the Department of Transportation, of which it is now a part. The defendant is Secretary of the Department of Transportation.

tivities at MarAd. She received from the Secretary of Commerce in 1979 a certificate in recognition for her EEO work.

One of these activities was a class action lawsuit, Harrison v. Dole, brought in 1977 by MarAd employees, alleging discrimination on account of sex and race. Ms. Shetler was deposed in June 1981 and was listed by the plaintiffs in October 1981 as a potential witness. She did not, however, testify at the trial in February 1982. By the time of the trial in Harrison, however, some employees at MarAd perceived Ms. Shetler to be an instigator or a ringleader of EEO activity at MarAd.

The plaintiff's case centers around the alleged animus toward her by Mr. Russell Stryker, associate administrator for policy and administration, who reported to Admiral Shear, administrator of MarAd.

The plaintiff and other witnesses testified that Mr. Stryker was displeased with Ms. Shetler's EEO activities and about the Harrison litigation in general. He occasionally made unfavorable comments about her to her supervisor and often mentioned her at weekly staff meetings during the Harrison litigation. The plaintiff testified that Mr. Stryker once referred to her as the "enemy" in a conversation with another MarAd employee.

The Office of Maritime Labor and Training, in which the plaintiff worked after 1977, analyzed long-term labor trends in the maritime industry, worked with the maritime labor unions, ran the U.S. Merchant Marine Academy, and operated other maritime labor programs. The plaintiff was a productive employee of the Office of Maritime Labor and Training.

MarAd was forced to make significant cutbacks in the number of its employees during the federal budget cuts of the early 1980s. For example, the agency was forced to cut the number of full time (or equivalent part-time) employees from 1249 in 1981 to 973 in 1984.

After consulting with Mr. Stryker, associate administrator for policy and administration, MarAd Administrator Admiral Shear ordered a "reduction in force" ("RIF") in 1982. He directed that much of the RIF be imposed on MarAd's Washington office and on the regional offices, in order to preserve as much as possible of the agency's shipbuilding, ready reserve fleet, and maritime subsidy activities.

Code 250 was ordered to reduce its staff from 13 to 12 employees. Admiral Shear ordered that the cut be made to co-

incide with the transfer of the agency's radar schools into private hands.

Mr. Friedberg decided that he would abolish Ms. Shetler's position, even though she had no responsibility for the radar schools. The positions of the three employees whose task it was to oversee the radar schools were not chosen for abolition. Mr. Friedberg stated that his decision was made because he concluded that the work Ms. Shetler was performing was of decreasing value to the agency.

The plaintiff testified that Mr. Friedberg, like Mr. Stryker, did not approve of the Harrison litigation and made disparaging comments about the meetings of the Harrison participants. She did not testify, however, that she heard him criticize her personally about EEO activities.

Not long before the RIF was to go into effect, however, another Code 250 employee unexpectedly resigned. Mr. Friedberg cancelled the abolition of Ms. Shetler's position, even though he did not have to do so.

Because of tightening budget constraints, however, MarAd officials by early 1983 concluded that the agency needed to decrease the number of its employes to 993 by October 1983. MarAd had 1054 employees at the beginning of 1983.

The administration and budget staff recommended another RIF to Mr. Stryker, who in turn sent a formal recommendation to Admiral Shear. In a memorandum of January 1983 to Admiral Shear, Mr. Stryker concluded that attrition would not lower the employment number from 1,054 to 993 by October 1983, and that RIF would be needed.

The Court does not accept the notion that Mr. Stryker somehow forced the idea of an unnecessary RIF on Admiral Shear. While Admiral Shear has stated that he of course preferred lowering the employment level by work force attrition rather than by a RIF, it did not appear to the administrative staff, Mr. Stryker, or Admiral Shear in early 1983 that attrition would be sufficient. Admiral Shear also stated that he preferred to abolish positions that were vacant whenever possible, instead of abolishing positions that were filled. As of early 1983, however, he believed that MarAd would have to abolish some occupied positions.

The 1983 RIF followed a pattern similar to the 1982 RIF. Once again, the regional offices and the Washington office suffered the deepest cuts, whereas the reserve fleet and Merchant Marine

Academy work force escaped relatively unscathed.

Even though MarAd implemented a general hiring freeze in 1982 that continued until 1984, the agency made exceptions in hiring8ng persons for some essential positions, such as s technicians and mechanics of the reserve fleet. The agency in July and October 1983 requested adding 29 new employees and was given permission by the Department of Transportation to hire 14. The plaintiff argues that because the agency's records and the memories of MarAd officials are not clear as to how the agency considered the effect of these 29 potential hirees on the total work force of 993, doubt must be cast on the validity of the decision to implement at RIF. The Court concludes, however, that the decfision to request 29 new hires in July and August need not have

been anticipated by MarAd officials in early 1983, when the decision to implement th RIF was made. Because of the uncertainties of attrition, emergencies, and other factors, an agency can never predict with certainty exactly how many employees it will have in the future, and thus it cannot tell with certainty how many employees it will have to dismiss in a RIF. Accordingly, the Court concludes that the uncertainty over whether the 29 potential hirees -- of which only 14 were approved -- were to be included in the total of 993 does not cause it to question the validity of decision to implement the RIF in the manner that it was implemented.

The head of the Office of Management and Organization, Mr. Mann, recommended to Mr. Stryker that Code 250 be cut by one employee. Mr. Stryker did not alter

the recommendation with regard to Code 250, and forwarded it to Admiral Shear. At trial, Mr. Mann testified that there was no specific "programmatic" reason for the cut at Code 250. Rather, such a cut was "proportionate to the average," considering Admiral Shear's preference for making most of the cuts at the Washington and regional offices.

Admiral Shear made several changes to the proposed RIF. Again following his policy of trying to preserve certain programs of MarAd, Admiral Shear altered the RIF so there would be fewer cuts at the maritime subsidy and shipbuilding programs. In return, once again, the regional offices and Washington office suffered the brunt of the cuts. For example, employment at Mr. Stryker's Office of Policy and Administration was to fall from 182 to 147.

The defendant also presented evidence that Admiral Shear himself made the decision to increase from one to two the number of persons in Code 250 to be laid off by the RIF. This change is reflected in a handwritten alteration to Mr. Stryker's proposal. Mr. Mann, Mr. Stryker, and Mike Myrtle each testified that it was Admiral Shear's handwriting; indeed, only Admiral Shear was authorized to make such a change. The Court concludes that the change was made by Admiral Shear's hand and that he, without Mr. Stryker's instigation, made the decision to increase the cut at Code 250 from one to two.

The Court rejects the plaintiff's contention that Mr. Stryker instigated either the RIF, the increase in Code 250's share of the RIF, or both, as a way of targeting Ms. Shetler for dismissal.

The plaintiff does note correctly that a number of key personnel in the RIF decisionmaking process reported to Mr. Stryker -- Mr. Mann, head of the Office of Management and Organization, Mr. Turanin, acting head of the Office of Personnel, and Mr. Earnest Hawkins, head of the agency's EEO office -- and that Mr. Stryker essentially was their conduit to Admiral Shear.

The decision to cut two positions from Code 250 appears to have been a reasonable one. The Office of Maritime Labor and Training performed some work that was less than essential; a report from Mr. Friedberg a few months earlier predicted delays and the abandonment of certain projects but no dire consequences if there was to be a RIF of up to three employees of Code 250.

After being informed that he would have to cut two of his employees and after seeing his protests go unheeded, Mr. Friedberg was faced with the choice of whom to lay off in his office. In making his decision, Mr. Friedberg analyzed the functions of his office and his dozen employees. He determined that the job performed by Ms. Shetler, although useful, was the least essential of the positions.

Ms. Shetler worked in five broad areas, Mr. Friedberg concluded, three of which occupied most of her time. First, she organized meetings concerning the Merchant Marine Academy Advisory Board and the Congressional Board of Visitors. Mr. Friedberg concluded that this function could be done by academy personnel. Second, Ms. Shetler monitored maritime labor legislation. This consisted primarily of following the proposed amend-

ments to the Longshore and Harbor Workers' Compensation Act; after enactment of the amendments the responsibility for oversight was shifted away from the agency. Third, Ms. Shetler planned mobilization for the merchant marine fleet.

In addition to these three major functions, Ms. Shetler also performed "ad hoc activities" -- such as revision of the federal maritime regulations -- and made studies in the area of shipyard labor. Mr. Friedberg concluded that there would be less need for shipyard studies as the agency withdrew its support of shipyards and as the government phased out the construction differential subsidies that had ben paid out to support American shipbuilding.

Because he determined that much of the functions that she had performed were no longer going to be necessary, Mr.

Friedberg concluded that the job held by Ms. Shetler was the least essential of the positions at his office, and that abolition of the position would be the least disruptive of the work of the office and the agency. The Court concludes that th reasons offered by Mr. Friedberg for his decision to eliminate Ms. Shetler's positions were bona fide.

The Court also determines that Mr. Friedberg did not eliminate Ms. Shetler's position in whole or in part because of animus arising out of her EEO activities.

The fact that Mr. Friedberg consistently rated Ms. Shetler highly as an employee during her six years at Code 250 is not strong evidence that his decision to lay her off in the 1983 RIF was the result of retaliation. Indeed, if Mr. Friedberg had wanted to retaliate against Ms. Shetler, who had performed a number

of EEO activities by 1979, he could have done so through poor evaluations. Rather, Mr. Friedberg's actions were more consistent with a supervisor who found Ms. Shetler a productive employee but who determined that her positions was the least essential at Code 250.

In addition, Mr. Friedberg's discussions with the plaintiff before 1983 regarding the vulnerability of her position to a RIF are more consistent with their express purpose -- to have the plaintiff's job restructured in order to minimize her exposure to a RIF -- than with the suggestion that Mr. Friedberg had pre-selected Ms. Shetler for a RIF or wanted to remove some aspects of her job. Ms. Shetler did not want to be reassigned to any of the other positions in the office that Mr. Friedberg suggested; ac-

cordingly, Mr. Friedberg did not change Ms. Shetler's job description.

The Court also rejects the suggestion that Mr. Friedberg showed retaliatory intent by his failure to lay off in 1982 any of the three male employees who worked with the radar schools, which were being privatized. Mr. Friedberg concluded that the privatization would result in more work for his office in the short run. In any event, it is also worth noting that Ms. Shetler was not laid off in the 1982 RIF; when another employee resigned, Mr. Friedberg contacted the personnel office and told it to cancel the RIF notice to Ms. Shetler, something that he did not have to do and something that he could have done if he truly harbored a desired to lay off Ms. Shetler because of her EEO activities.

In addition, the plaintiff contends that the defendant showed retaliatory intent in 1983 by failing to offer Ms. Shetler a GS-6 typing job in lieu of dismissing her entirely. She notes that her government job application stated that she was fairly proficient at typing. Under civil service rules, the defendant did not have to offer her the typing job. The plaintiff argues that if her supervisors did not have retaliatory intent, they would have offered her the typing position. The Court disagrees, noting the obvious managerial problems that would likely arise if an employer were to demote a high-level employee to a typing job. It is also worth noting that Ms. Shetler was offered a typing position when it appeared that her job would be abolished in the 1982 RIF -- action that would appear inconsistent with the con-

tention that the 1982 RIF was the defendant's first attempt to remove Ms. Shetler.

Furthermore, the plaintiff contends that the defendant showed retaliatory intent by failing to have Ms. Shetler "bump" another employee. Instead, the positions of the one employee that the plaintiff could have "bumped" also was abolished in the 1983 RIF. The plaintiff suggests that this was done in order to avoid having Ms. Shetler take the position. The Court concludes, however, that there is no reason to believe that the action was taken for a reason other than the one stated by the defendant -- that the position was chosen for abolition because it was more expendable than other positions.

Finally, the Court concludes that Mr. Friedberg's personnel decisions after

the plaintiff was laid off in the 1983 RIF do not show that he had purposely targeted Ms. Shetler for the RIF. For example, the plaintiff maintains that Mr. Friedberg gave preferential treatment to Mike Ercole, who had no involvement in EEO litigation and who also was designated for separation through the RIF. The Court concludes, however, that Mr. Ercole was not separated until after the plaintiff because of his veteran's preference status.

II. Conclusions of Law

Claims of unlawful retaliation against an employer for protected antidiscrimination activity, pursuant to section 704(a) of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-3(a)), follow the same framework as more traditional Title VII claims. McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984) (citing McDonnell Douglas Corp. v. Green, 411 U.S., 792 (1973), which set forth the framework for proving a Title VII claim). A plaintiff must first establish a prima facie case of retaliation by showing: (1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that there is at least an inference of a causal connection between the two. McKenna, 729 F.2d at 790. An activity is protected if it involves oppos-

ing alleged discriminatory treatment by the employer or participating in legal efforts against the alleged treatment. 42 U.S.C. § 2000e-3(a). A prima facie case, which traditionally is fairly easy to establish in a Title VII case, may be made in a retaliation case merely through circumstantial evidence that an adverse employment action was taken against the plaintiff not long after she participated in protected activity. Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985).

Once a prima facie case has been made out, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for the adverse employment action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If this is done, the plaintiff may then try to prove that the

articulated reason was actually a pretext for unlawful retaliation. Chen v. GAO, 821 F.2d 732 (D.C. Cir. 1987). The ultimate burden of persuasion in proving retaliation remains with plaintiff. Burdine, 450 U.S. at 256.

A plaintiff may also prevail in a Title VII case by using new frameworks of proof developed by courts in recent years to supplement the tradition McDonnell Douglas path. First, a plaintiff may prevail if she fully discredits the defendant's stated nonretaliatory reason, even without showing any direct evidence of discrimination. King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1986). Second, when a plaintiff has established that the defendant's decision was based in part on an improper motivation and in part on a legitimate reason, the employer has the burden of proving "that its legitimate

reason, standing alone, would have induced it to make the same decision": Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1792 (1989) (Brennan, J.). The employer may prevail if it convinces the Court of this by a preponderance of the evidence. Id. In Price Waterhouse, one justice wrote that when the plaintiff has established the existence of improper motivation, the Court should state whether its analysis then proceeds under the McDonnell Douglas or the Price Waterhouse framework. Id. at 1805 (O'Connor, J., concurring).

In the instant case, the Court concludes that the plaintiff succeeded in making out a prima facie case of retaliation. Although the defendant points out that it was nearly two years between the plaintiff's last overt activity in the Harrison litigation and her separation,

see, e.g., Clark v. Chrysler Corp., 673 F.2d 921, 930 (7thy Cir.) (two years between protected activity and adverse action is too long to establish a prima facie case of retaliation), cert. denied, 459 U.S. 873 (1982), the Court believes that the two-year period is a slightly misleading figure in this case. Although the last time the plaintiff participated in Harrison was by giving a deposition in June 1981, she was on the list of possible defense witnesses in late 1981. Moreover, because Harrison did not go to trial until early 1982, it would be reasonable to assume that any animosity kindled by the litigation would not abate until well into 1982. Finally, it is notable that the plaintiff was first told that she would be laid off in the 1982 RIF only a few months after the trial in Harrison, even though this notification

was later canceled. Because the date of the first RIF certainly was close enough to make out a prima facie case of retaliation, the Court believes that the fact the plaintiff was laid of in the next RIF also is enough to establish a prima facie case.

Moreover, even if the plaintiff's discussions with the active members of the Harrison litigation were not protected activity -- and the Court does not need to decide whether they were -- the fact that the plaintiff maintained contact with these employees makes it more reasonable to infer the possibility of retaliation against her in 1983.

Finally, the plaintiff helps prove a prima facie case of discrimination by citing negative comments by Mr. Stryker and Mr. Friedberg regarding EEO activities. Although the officials did not

take any adverse action against the plaintiff when they made the comments, the statement themselves help connect the plaintiff's EEO activity and her dismissal enough to help establish a prima facie case.

The Court also concludes, however, that the defendant articulated legitimate, nonretaliatory reasons for dismissing Ms. Shetler in the 1983 RIF and that the plaintiff failed to prove that these reasons were pretextual. In doing so, the Court notes that it uses the traditional McDonnell Douglas framework, instead of the Price Waterhouse path. See Price Waterhouse, 109 S. Ct. at 1805 (O'Connor, J., concurring) (stating when a court should use each framework). It does so because the plaintiff, in the Court's opinion, failed to prove that the defendant had a "dual motive" -- retalia-

tion and a valid reason -- for taking adverse action against the plaintiff. The conclusion that the plaintiff has met the relative low burden of making out a prima facie case of retaliation by establishing an inference of retaliation is not the same as establishing that the defendant actually had a retaliatory motive in dismissing the plaintiff. In the instant case, the agency provided solid nonretaliatory reasons for the actions that it took, and the plaintiff failed to convince the Court that these reasons were pretextual, or even that retaliation was part of the agency's reasons for taking action against the plaintiff.

As stated in the findings of fact, the Court rejects the plaintiff's allegations that either Mr. Stryker or Mr. Friedberg manipulated the RIF process in order to have Ms. Shetler dismissed.

While it is true that Mr. Stryker and Mr. Friedberg expressed displeasure by EEO work and disagreed with Ms. Shetler over whether she was spending too much time on EEO activities, this fact does not overcome the showing by the defendant that the decisions to implement the RIF and to abolish Ms. Shetler's position were made for sound administrative and personnel reasons. As stated in the findings of fact, the Court is convinced that the nonretaliatory reasons given for the dismissal of Ms. Shetler were the true and only reasons for her dismissal.

The agency decided to implement the 1983 RIF because of the requirement of personnel cuts and the reasonable prediction that attrition would not lower the number of employees to the level that the agency wanted in 1983. The recommendation of a RIF originated below Mr.

Stryker and was approved by Admiral Shear. The plaintiff has failed to convince the Court that the RIF was urged by Mr. Stryker as a way of getting to Ms. Shetler. The plaintiff failed to discredit the stated reason for the RIF, failed to prove that it was pretextual, and failed to prove that the agency's decisionmakers took into account retaliatory motives at all in deciding to implement the RIF. The plaintiff did show that the agency did not necessarily take into account in its calculations the fact that it would seek approval for 29 new emergency hires in 1983. This fact does not, however, discredit the reasons for the RIF, establish that they were pretextual, or prove that they were motivated even in part by a retaliatory motive.

In addition, the Court concludes that the agency showed valid reasons for

the decision to dismiss employees from the plaintiff's offices. While the plaintiff showed that the agency had no "programmatic" reason for making cuts in the Code 250 office, the Court notes that an agency cannot be required to have a specific reason for cuts at each office during an agency-wide RIF. The fact that an agency-wide cut is desired is, almost by definition, enough. It is clear that Admiral Shear wanted the cuts to fall primarily on the regional and Washington offices. It is also clear that the cuts suffered by Code 250 were not extraordinary; indeed, they were less severe than those suffered by other offices. Finally, it is clear that the handwritten increase in the number of cuts at Code 250 from one to two was made in Admiral Shear's hand; there is no evidence that Mr. Stryker pushed for this change to his

own proposal. In sum, the plaintiff failed to discredit the defendant's reasons for the cuts to Code 250, failed to prove that they were pretextual, and failed to prove that the agency was motivated even in part by a retaliatory motive.

Finally, the Court concludes that the agency established a solid and undiscredited rationale for the decision to abolish the plaintiff's position in the RIF. Mr. Friedberg concluded that, although the plaintiff was a valued worker, most of her job functions either could be done by other persons or were decreasing in importance as MarAd's functions changed. The plaintiff again failed to prove that these stated reasons were not the true ones. The Court's conclusion is not swayed by the fact that the plaintiff, a high-level official at the time,

was not offered a GS-6 typing position, nor by the fact that the one position occupied by an employee that the plaintiff was entitled to "bump" also was abolished. Again, the Court does not believe that the plaintiff either discredited the stated reason for the decision to abolish the plaintiff's position, proved that the stated reason was pretextual, or that the agency was motivated even in part by retaliatory motives.

In conclusion, the Court notes that when a plaintiff establishes in a retaliation case that her supervisors at one time expressed animosity toward her EEO activities, the Court must examine with the closest scrutiny the employer's stated reasons for the adverse action taken against the employee. On the other hand, when the employer has compelling nonretaliatory reasons, the plaintiff

cannot shield herself from adverse action merely because of the earlier expressions of animosity. In the instant case, the plaintiff failed to prove that Mr. Stryker conjured up a RIF in the hope that Ms. Shetler would be dismissed, or that Mr. Friedberg used the opportunity of the RIF to fulfill a retaliatory urge by abolishing Ms. Shetler's position, or that Mr. Stryker and Mr. Friedberg conspired to eliminate the plaintiff's job. The Court concludes that the agency proved that its actions were taken because of legitimate, nonretaliatory reasons. The Court finds no liability under Title VII.

9/11/89 /s/ George H. Revercomb
Date George H. Revercomb, Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SHETLER GLOBUS, Plaintiff v. No. SAMUEL SKINNER, Defendant	)	Civil Action 85-1582 ORDER

This case involves the alleged unlawful retaliation against an employee for her antidiscrimination activities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Trial of the action took place in April 1989 and judgment in favor of the defendant was ordered in September 1989. In reaching its decision, the Court determined that plaintiff's termination was due to a bona fide reduction in force

("RIF"). The decision to eliminate plaintiff's position was not due "in whole or in part because of animus arising out of her EEO activities."

Plaintiff now asks the Court to reconsider its earlier ruling and to award judgment in favor of plaintiff, claiming that defendant violated Title VII by failing to offer plaintiff a clerical positions at GS level 6 upon the elimination of her GS 13 job. Having considered plaintiff's motion to alter judgment, the legal memoranda and exhibits submitted by both parties and the files and records in this action, IT IS HEREBY ORDERED, that plaintiff's motion to alter judgment is DENIED.

Plaintiff failed to present a prima facie case of retaliation with respect to her claim that defendants failed to offer her a GS 6 clerical vacancy.[1] There is no evidence that such a clerical position was available.[2] Plaintiff points only to the general testimony that one of the four clerical positions exempt from the 1983 RIF was vacant at the time of plaintiff's termination. Plaintiff then asks the Court to "infer that the [defendant's] office had determined that that vacancy was going to be filled." The Court will not indulge plaintiff in this inference. Ms. Globus and her coun-

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[1] A prima facie case establishing retaliatory termination is different that the case alleging defendant's improper failure to offer alternative employment in the midst of a bona fide reduction in force. The plaintiff who claims that an employer failed to offer her another job must show, as part of her prima facie case, that such a position was available.

[2] The parties also dispute whether plaintiff had the adequate skills for such a position even if one had been available.

sel had the opportunity to develop direct testimony regarding the alleged vacancy at trial. In the absence of such evidence, this Court will not "infer" an essential element of plaintiff's case after trial.

Furthermore, even if plaintiff had succeeded in establishing a prima facie case, plaintiff has not proved that defendant's reasons for failing to offer plaintiff a clerical position were merely pretextual. This Court has already found that the defendant articulated legitimate reasons for its dismissal of Ms. Globus. Defendant needed to eliminate plaintiff's job as part of a general reduction in force and, as all parties agree, defendant had no obligation to offer plaintiff another position. Defendant reasonably believed that plaintiff would not accept a lower clerical position since she had

previously rejected a similar demotion when faced with termination resulting from a reduction in force in 1982. Defendant also introduced testimony that indicating that demotion of a relatively high level employee, such as plaintiff, to the level of GS 6 would create obvious managerial problems.

Having found that defendant articulated legitimate reasons for the termination of Ms. Globus, the Court then thoroughly evaluated plaintiff's claims that her dismissal was retaliatory. After examining all of the evidence, the Court found that plaintiff failed to show that the agency's reasons for dismissal were pretextual or that the agency was motivated in any way by retaliatory reasons to take action against the plaintiff. Nothing in plaintiff's recent motion changes this determination, nor does

plaintiff argue that defendant's conduct was in fact retaliatory.

Accordingly, we see no reason to change this Court's order of September 12, 1989. Plaintiff's motion to alter judgment is DENIED.

11/21/89 /s/George H. Revercomb
DATE UNITED STATES DISTRICT COURT
JUDGE GEORGE H. REVERCOMB

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5020 September Term, 1989
C.A. No. 85-01582

Filed Aug 13 1990
Constance L. Dupré
Clerk

KATHLEEN SHETLER GLOBUS,
Appellant

v.

SAMUEL K. SKINNER, et al.

BEFORE: Buckley, Sentelle and Thomas, Circuit Judges

O R D E R

Upon consideration of appellant's Petition for Rehearing, filed October 10, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: \s\ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Tr. 21

QUESTION: Based on statements that Mr. Stryker made directly to you or in your presence, do you know whether Mr. Stryker considered some people in the agency to be his enemies?

CAPT. WHITCHER: This was a remark which he made fairly commonly and although at first I thought this was a joking reference I came to feel that he was serious about problems that he was having with other associate administrators and other officials.

QUESTION: Are you personally aware of Mr. Stryker making decisions based on statements by him of animosity towards particular people?

CAPT. WHITCHER: I recall one instance very, very clearly, because it was the first time that I really was shocked at an action taken by Mr. Stryker. Mr. Stryker called me into his office. There was another associate administrator in the office. This associate administrator outlined to me certain changes in the physical arrangement of his office and its location. Mr. Stryker asked me could this be done. I said it could. Mr. Stryker said, "when can you do this?" And I said, "I will get to it just as soon as I leave this office."

The associate administrator left the office and I said, "I'll be on this this morning." He said, "Don't you do a thing."

Tr. 22

QUESTION: Who said, "Don't you do a thing?"

CAPT. WHITCHER: Stryker said, "Don't do a thing." He said, "That man is an enemy of ours."

QUESTION: Do you know the extent to which Mr. Stryker would quickly forgive his enemies or forget the grounds of animosity?

CAPT. WHITCHER: To the best of my knowledge, he never forgave anybody anything.

* * *

THE COURT: He said he didn't think that he would ever forgive anybody for anything they did adverse to him. He held a grudge a long time, I guess.

* * *

QUESTION: Did you ever hear Mr. Stryker use the term, and I quote, "women's lib?"

Tr. 23

CAPT. WHITCHER: Yes, indeed.

QUESTION: And do you recall his mentioning this term or using this term in connection with any particular employees in the agency?

CAPT. WHITCHER: At a time that a class action suit was instituted by certain employees of the Maritime Administration,

in connection with women and blacks, he was very, very much concerned about I think what he considered extremities of women in the women's lib movement.

QUESTION: Did he say anything that leads you to that belief?

CAPT. WHITCHER: Yes, indeed, he just thought that the women were on the wrong track.

QUESTION: Was Ms. Shetler's name mentioned in this connection by Mr. Stryker?

CAPT. WHITCHER: Mr. Stryker was very much concerned about the fact that Ms. Shetler, he said, was one of the instigators of this suit.

THE COURT: You're talking about the class action?

CAPT. WHITCHER: Of the class action.

QUESTION: How often was there discussion at the senior staff meeting of this class action lawsuit?

CAPT. WHITCHER: Well, this class action process went on for a long period of time. Mr. Stryker would mention this at virtually every one of his staff meetings with increasing concern about all of the problems that this was causing for him and for the Maritime Administration and so on and so forth.

Tr. 24

QUESTION: And to what extent was Ms. Shetler's name used in these staff meetings?

CAPT. WHITCHER: Her name came up all the time.

QUESTION: In what context?

CAPT. WHITCHER: In the context that she was the ring leader in this class action suit.

Tr. 30

QUESTION: To your knowledge, did Mr. Stryker involve himself in the personnel decision making of all of his office directors?

CAPT. WHITCHER: Yes he did. . . .

QUESTION: Well, other than office directors though, Mr. Whitcher, did Mr. Stryker involve himself in lower-level positions, GS-11s, GS 12s, clerk typists?

CAPT. WHITCHER: Yes, he did.

QUESTION: For all of the hundreds of people under him, is that your testimony?

CAPT. WHITCHER: I wouldn't say for everyone of the hundred people under him, but when certain positions became vacant, such as a position in the correspondence control organization, under Mr. Flanagan, then Mr. Stryker was very active in con-

sidering how vacancies would be filled or changes would be made.

Tr. 51-52

QUESTION: And you also looked at Ms. Shetler, is that correct?

MR. FRIEDBERG: That's correct.

QUESTION: And you decided that hers was the position that you could best do without, is that correct?

MR. FRIEDBERG: That is correct.

QUESTION: Now, this was not a matter of it being a useless function, was it? This was not something you were trying to get rif of for a long time, was it?

MR. FRIEDBERG: Not at all.

QUESTION: She was a valued member of your staff?

MR. FRIEDBERG: She was very good. She was a good worker. We had good working relationships. She was performing functions that were good functions for the agency.

Tr. 81

QUESTION: Generally, during the time she was in your office, were you satisfied with her work performance?

MR. FRIEDBERG: Yes.

QUESTION: Do you recall what ratings you gave her during that period?

MR. FRIEDBERG: Well, they were always more than just satisfactory. There were commendables and outstandings.

Tr. 106

QUESTION: Can you waive qualifications in order to let Ms. Shetler or anyone else bump another employee?

MR.TURANIN: No. No you cannot.

QUESTION: Can you waive qualifications in order to let an employee be assigned into a vacancy?

MR. TURANIN: That's permissible, yes.

Tr. 123

QUESTION: Back in 1982 Ms. Shetler had -- you had determined that Ms. Shetler was qualified to bump an employee named Watson, is that correct?

MR. TURANIN: Yes.

QUESTION: And Ms. Watson was a GS -- series 3003, grade 6 employee with the job title of "Supply Service and Procurement Assistant (Typing), " is that correct?

MR. TURANIN: Yes.

* * *

QUESTION: Ms. Shetler's personnel folder show that the greatest speed she claims is 25 words per minute, is that correct?

MR. TURANIN: I don't recall her personnel folder demonstrating that she had any typing skills.

QUESTION: Did you review her personnel folder in determining whether she could bump Ms. Watson?

MR. TURANIN: Did I review her folder?

QUESTION: Yes.

MR. TURANIN: I don't recall whether I reviewed it at that time or whether one of the RIF members reviewed it, but it would have been reviewed, yes.

Tr. 125

QUESTION: A RIF member meaning someone on your staff.

MR. TURANIN: Yes.

QUESTION: And whoever it was did determine that Ms. Shetler was fully qualified for this supply service job?

MR. TURANIN: I would say "qualified."

QUESTION: Well, sufficiently qualified to bump somebody else?

MR. TURANIN: Yes.

QUESTION: And you didn't offer that particular job to Ms. Shetler, is that correct?

MR. TURANIN: That is correct?

QUESTION: You offered another job with "(Typing)" in it, a mail clerk typing?

MR. TURANIN: Correspondence clerk, I believe it was.

QUESTION: Correspondence clerk typing?

MR. TURANIN: Yes.

QUESTION: And Ms. Shetler accepted that job?

MR. TURANIN: Yes.

Tr. 328

MR. MANN: The 993 positions that were selected for retention were viewed as the high-priority vacant positions and, to the extent that those positions were not filled, there were requests for filling those positions, since they were within the high-priority 993.

At the time of the reduction in force, when there were 962 employees onboard, there were remaining 31 high-priority positions. Those high-priority positions were so high that Admiral Shear had requested exemptions to the hiring freeze to fill 14 of them in July of 1983 and would later request exemptions to the hiring freeze to fill virtually all the remaining ones.

QUESTION: Now, in that regard, Mr. Mann, let me call your attention to defendant's exhibit 4.

THE COURT: That doesn't explain your question. It doesn't explain it to the court. How does that explain why the 962 is the -- if you are only required to have 992 and you come up with 962, how does that explain that you aren't riffing more than you have to.

Because the head of the agency wants to give priority to some, what does that have to do with it? I don't understand you. Maybe it's my fault, but I don't understand what you mean.

Tr. 281

MR. MANN: The reduction was designed to retain the highest priority 993 positions. People who were not retained after the RIF were not occupying positions that had been selected for retention.

THE COURT: Well, that doesn't explain why they were if you had 992. You had a ceiling of 992, is that correct?

MR. MANN: A position ceiling of 993, yes, sir.

THE COURT: 993. Regardless of whether they were skilled, high-priority, or anything else. It was 993, is that correct?

MR. MANN: Positions, yes, sir.

THE COURT: And you end up with 962?

MR. MANN: Employees.

THE COURT: Explain to me again then why you didn't RIF more than you had to.

MR. MANN: Because the office directors, at the request of the administration, had identified those positions that they wanted to retain, they considered so important.

THE COURT: That's included in the 993.

MR. MANN: Yes, sir, and those position --

C: So, they were retained.

MR. MANN: They were retained and they were vacant as of the date of the reduction in force.

THE COURT: They were vacant as of that date. So, the idea being is that that's how you get down to 962 plus the priority positions. It's 962 plus the unfilled positions?

Tr. 282

MR. MANN: Yes, sir.

THE COURT: Well, thank you.

* * *

Tr. 306

QUESTION: Looking at Defendant's Exhibit 4, there is, first of all, a set that's dated July 12. These positions seem primarily to be in the Merchant Marine Academy and some of the Western Region, is that correct, the James River Reserve Fleet.

MR. MANN: Yes, as I'm looking at them

QUESTION: It is my understanding, also, although I couldn't figure it out at lunch, that if we look at each of the individual sheets, it should come up to a total of 14 positions?

Tr. 307

MR. MANN: I'm not sure that they are all here, but there were 14 memoranda sent to the department. I'm sorry, 12 memoranda requesting 14 exemptions is the way it is put in Dr. Fairman's memoranda.

* * *

QUESTION: Then the October 25th group of documents has 15 positions.

MR. MANN: Yes.

QUESTION: Of which 10 are in the James River Reserve Fleet and the others are elsewhere in the regions?

MR. MANN: Yes. And there's a communications specialist for code 310 there, as well.

* * *

QUESTION: Let me show you -- these 10 or these 15 positions also should correlate. These are after the RIF. They should correlate with the number of vacancies in the appropriate organizations, is that correct?

MR. MANN: They would represent part of the vacancies not necessarily all of the vacancies.

QUESTION: I show the witness Plaintiff's Exhibit 310 and ask him first of all if he recognizes this as a document produced by Mr. Turanin.

MR. MANN: It looks like something that Mr. Turanin produced, yes.

QUESTION: It indicates, as I read it, that the code 220, which is the office of chief counsel, is under ceiling by three positions?

MR. MANN: That's right.

QUESTION: Were any of the high-priority positions among those?

MR. MANN: Yes.

QUESTION: Which were they?

MR. MANN: There were three attorneys at that time -- three attorney positions, including the chief counsel.

QUESTION: And that's in the documentation we have here?

MR. MANN: Those positions had not been requested for exemptions from the hiring freeze, at that point.

QUESTION: Well, as far as the document we have, the evidence, are those three positions among the exemption requests that have been produced for us?

Tr. 309

MR. MANN: Not yet, no, they have not.

QUESTION: And code 340 is one under ceiling. Do you recall what the high-priority exemption request for that office was?

MR. MANN: It's referred to here as a computer specialist, GS-13 as the vacancy.

QUESTION: Well, was that a high priority position for which you were requesting exemption?

MR. MANN: I don't know if that particular position was requested, but it was one of the remaining 993 positions.

QUESTION: The answer is, you do not recall whether it's one of those for which it was important enough to seek an exemption, is that correct?

MR. MANN: I don't know.

QUESTION: Well, let me ask you to look again at Defendant's Exhibit 4 and tell me if it's one of those which is covered by Defendant's Exhibit 4.

MR. MANN: (Perusing documents.) As I'm going through it here I don't see that position but it was one that could have been requested as an exemption to the hiring freeze.

QUESTION: Yes. And code 360-R that's a clerical reserve, is that correct?

MR. MANN: Yes.

QUESTION: What grade level are those employees, do you know?

MR. MANN: They are typically clericals, GS-4, 5 and 6.

QUESTION: And that area is shown as one under ceiling. Do you recall whether an exemption was requested in order to hire a GS-4, or 5, or 6 clerical employee?

Tr. 310

MR. MANN: No, I don't.

Pl. Exh. 274
[excerpts]

p. 18-19

PLAINTIFF'S FOURTH INTERROGATORY No. 20(a): In the 1982 or 1983 reduction in force was any employee offered a vacancy even though he or she had not been determined to be entitled to displace an employee at or below the grade of that vacancy?

RESPONSE: Yes. It is MarAd's policy to offer authorized vacancies to employees whose positions would be affected by RIF, provided they meet the qualifications requirements for those vacancies.

Def. Exh. 3
[excerpts]

2. A personnel action freeze was implemented on July 1, 1983. Vacancies could not be filled after that date unless employees who were scheduled to be affected by RIF were selected for those vacancies. There were successful placements; for example, Code 500 agreed to make offers to vacant positions to 4 employees who would either have bumped other employees or who would have been separated by RIF. Other vacancies were filled in the same manner.

* * *

9. We continue to make referrals to other organizations and, of course, to make every effort to place affected employees within MARAD.

Def. Exh. 6
[excerpts--
vacancies offered in HQ]

GS-9	Thomas, P.	GS-7 Secty (Steno)
GS-11	Bryant, Memphis	GS-8 Trade Route Asst
GS-14	Ledbetter, Roscoe	GS-13 Contract Spec
GS-7	Higbee, Ann	GS-6 Secty-typing
GS-7	Watson, Carol	GS-5 Accountant
GS-6	Hawkins, Beverly	GS-6
GS-4	Byers, Cheryl	GS-4 Clerk-typist
GS 9	Isaac, Joyce	GS-6 Secty (Steno)
GS 12	Foltz, Alvin	GS 4 Clerk Typist
GS 7	Washington, Y	GS 6 Subs Rate Asst
GS 12	Laprade, Rona	GS 6 Secty (Typing)
GS-14	Faruki, John	GS-4 Clerk Typist

Def. Exh. 18
[excerpts]

Date: April 16, 1982

ACTION: Civilian Hiring Freeze

From: The Deputy Secretary

In order to place the Department of Transportation (DOT) in the best possible posture to adapt to changing resources and programs, the Secretary is establishing, effective close of business today, a Department-wide freeze on outside civilian hiring. This freeze includes all hires of persons from outside DOT on a full-time permanent or part-time permanent basis, including transfers from other Federal agencies. Commitments made by authorized officials prior to the issuance of this memorandum will be honored.

The exemptions to this freeze are as follows:

1. Personnel actions resulting int he movement of employees within the Department. . . .

* * *

Stipulations (Jt. Exh. 1)
[excerpts]

¶ 32. Significant dates in the Harrison litigation include the following:

complaint filed with agency	8/77
complaint filed in court	7/79
Shetler affidavit filed	2/80
* * *	
Pre-trial briefs filed (plaintiffs' brief lists Shetler as witness)	10/81
Second Friedberg deposition taken	2/82
Trial	2/82
Findings of Fact and Conclusions of Law	6/82
Final injunction	3/83

¶ 70. Attrition reduced actual employment to 994 by the end of June, 1983.

¶ 71. Attrition reduced actual employment to 984 by September 25, 1983.

¶ 72. The effect of going through with the reduction in force was to reduce actual employment as of October 1, 1983, to 956.

Appellee's Reply [to Appellant's Opposition to Motion for Summary Affirmance]
[excerpts]

p. 4

Moreover, the decision whether to fill a vacant position lay not with Mr. Turanin, but rather with Jack Mann, the manager who had the vacancy.

* * *

Although the existence of a clerical vacancy is uncontradicted, at least four

p. 5

other points, critical to appellant's case were in dispute: 1) whether MARAD requested an exemption from the hiring freeze to fill the position; 2) whether appellant was a qualified typist; 3) whether appellant was entitled to the position; 4) whether the failure to offer appellant the position was due to an illegal, retaliatory motive.

FILED
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No. 90-1506

In the Supreme Court of the United States

OCTOBER TERM, 1990

KATHLEEN SHETLER GLOBUS, PETITIONER

v.

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that, in order to establish a violation of Title VII consisting of an allegedly retaliatory failure to offer her a position, petitioner was required to prove that there was an available position.

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OPINIONS BELOW

The order of the court of appeals summarily affirming the district court's judgment (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-37a) is reported at 721 F. Supp. 329. The order of the district court denying petitioner's motion to alter judgment (Pet. App. 38a-43a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. A petition for rehearing was denied on November 30, 1990. Pet. App. 44a. On February 15, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 28, 1991. The

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Between 1967 and 1983, petitioner was an employee of the Maritime Administration (MarAd), ultimately in a GS-13 position. In the 1970s and early 1980s, petitioner was involved in a number of equal employment opportunity activities at MarAd, including a class action lawsuit alleging that MarAd discriminated on the basis of race and sex. Petitioner was deposed in the suit in 1981, and the plaintiffs listed her as a potential witness. Although she did not testify, she was perceived by some MarAd employees as an "instigator or ringleader of EEO activity at MarAd." Pet. App. 4a-5a.

As a result of budget cuts in the early 1980s, MarAd was forced to make substantial reductions in the number of its employees. In 1982, MarAd selected petitioner's position, among others, to be abolished in a reduction in force. The position was preserved, however, when another employee unexpectedly resigned. The following year, in another reduction in force, MarAd abolished petitioner's position. After exhausting her administrative remedies, petitioner filed suit, alleging that MarAd had violated Title VII, 42 U.S.C. 2000e-3(a), by discharging her in retaliation for her anti-discrimination activities. Pet. App. 6a-7a.

b. After a trial, the court found that petitioner had established a prima facie case of retaliation by showing "(1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that there is at least an inference of a causal connection between the two." Pet. App. 24a, 27a-30a. However, the court held that there was "no liability under Title VII" because MarAd had "articulated legitimate, nonretaliatory reasons for dismissing

[petitioner] in the 1983 RIF" and because she had "failed to prove that these reasons were pretextual." *Id.* at 30a, 37a. Based upon detailed findings of fact regarding the events that culminated in the decision to abolish petitioner's position, the court was "convinced that the nonretaliatory reasons given for the dismissal of [petitioner] were the true and only reasons for her dismissal." *Id.* at 32a. In passing, the court also rejected the claim that MarAd "showed retaliatory intent in 1983 by failing to offer [petitioner] a GS-6 typing job in lieu of dismissing her entirely." *Id.* at 21a, 35a-36a.

c. Petitioner filed a motion to alter judgment, arguing that MarAd "violated Title VII by failing to offer plaintiff a clerical position[] at GS level 6 upon the elimination of her GS 13 job." Pet. App. 39a. The district court rejected that new theory of liability on two alternative grounds.

First, the court concluded that petitioner "failed to present a prima facie case of retaliation with respect to her claim that defendants failed to offer her a GS 6 clerical vacancy" because there was "no evidence that such a clerical position was available." Pet. App. 40a. The court explained that, by contrast to petitioner's claim of retaliatory discharge, her claim of "improper failure to offer alternative employment in the midst of a bona fide reduction in force" required, for a prima facie case, a showing "that such a position was available." *Id.* at 40a n.1. To satisfy that burden, the court continued, petitioner relied only on "general testimony that one of the four clerical positions exempt from the 1983 RIF was vacant at the time of the plaintiff's termination," asking "the court to 'infer that [MarAd's] office had determined that that vacancy was going to be filled.'" *Id.* at 40a. Noting that petitioner had the "opportunity to develop direct testimony regarding the alleged vacancy at trial," the court declined to "'infer' an essential element of plaintiff's case after trial." *Id.* at 41a.

Second, the court also found that "even if [petitioner] had succeeded in establishing a prima facie case," she had "not proved that defendant's reasons for failing to offer [her] a clerical position were merely pretextual." Pet. App. 41a.

2. The court of appeals summarily affirmed. Pet. App. 1a-2a. It upheld "the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separation solely on the ground that appellant failed to establish a *prima facie* case concerning the availability of such a position." *Ibid.*

ARGUMENT

Petitioner presented different theories of liability at trial and in her motion to alter judgment. At trial, the theory of petitioner's case was that MarAd abolished her position in the 1983 reduction in force in retaliation for her equal employment opportunity activities. In her motion to alter judgment, petitioner argued that MarAd's retaliation took the form of a failure to offer her a clerical position instead of terminating her employment altogether. The petition presents only the second claim. Pet. 9-10, 14 n.8. Petitioner's basic contention is that the district court and the court of appeals should not have required her to bear the burden of proving that there was an available vacancy. Pet. 41-42. There is no merit to that contention, and it presents no question warranting this Court's review.

1. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court established the order of proof in Title VII discrimination cases. The plaintiff has the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-253. In cases alleging discrimination in hiring,

the plaintiff "must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Id.* at 253. If the plaintiff makes out a prima facie case, then "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Ibid.* (quoting *McDonnell Douglas*, 411 U.S. at 802). Finally, if the defendant carries this burden, then the plaintiff must have "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253.

Although the *McDonnell Douglas/Burdine* framework was designed for claims that an employer has violated Title VII by engaging in invidious discrimination, the courts of appeals have adapted it to claims that an employer has retaliated against an employee because of protected equal employment activities. *E.g.*, *Williams* v. *Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), cert. denied, 111 S. Ct. 345 (1990); *Jennings* v. *Tinley Park Community Consol. School Dist. No. 146*, 796 F.2d 962, 966-967 (7th Cir. 1986), cert. denied, 481 U.S. 1017 (1987); *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).[1] The courts of appeals are in agreement that a prima facie case for a retaliation

---

[1] Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

claim consists of proof that the plaintiff engaged in statutorily protected activity, that the employer took an adverse personnel action, and that there is some basis for inferring a causal connection between the plaintiff's activities and the employer's action. *Ibid.*

The precise showings required for a prima facie case depend on the nature of the allegedly unlawful personnel action. Obviously, if a plaintiff claims that the retaliation took the form of a failure to hire her or to place her in a particular position, the plaintiff cannot prove that she was the victim of an adverse personnel action without demonstrating that a vacancy existed.[2] Absent an available vacancy, there is no adverse personnel action. That is this case. Petitioner asked the court to find that MarAd had discriminated against her by failing to offer her a clerical vacancy. The court found, however, that "there [was] no evidence that such a clerical position was available." Pet. App. 40a. Thus, petitioner simply failed to prove the form of retaliation that she asserted in her motion to amend the judgment.[3]

---

[2] Indeed, in cases in which alleged retaliation takes the form of a failure to hire or promote the plaintiff, the D.C. and Eleventh Circuits require the plaintiff to demonstrate "as part of the prima facie reprisal case that he was qualified for the position." *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 n.5 (D.C. Cir. 1985); *Williams* v. *Boorstein*, 663 F.2d 109, 116 & n.43 (D.C. Cir. 1980), cert. denied, 451 U.S. 985 (1981); *Canino* v. *EEOC*, 707 F.2d 468, 471-472 (11th Cir. 1983).

[3] Petitioner relied on testimony that one of the clerical positions exempt from the reduction in force was not occupied. See Pet. App. 40a. Under the circumstances of this case, however, that evidence was insufficient to prove an *available* vacancy. Even assuming that an authorized position was empty, there was no showing that the agency had any intention of filling it. In *McDonnell Douglas*, this Court indicated that the prima facie case for a claim based upon a discriminatory failure to hire involved a showing that after the plaintiff was rejected, "the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications." 411 U.S. at 802.

2. Contrary to petitioner's contention (Pet. 30, 50-63), the standards applied to petitioner's claim are entirely consistent with the framework established in *McDonnell Douglas* and *Burdine*. With the exception of the motive for the alleged adverse personnel action, petitioner's claim is indistinguishable from a claim that an employer failed to offer a vacancy to a potential employee on the basis of race, sex, national origin, or religion. In the latter case, *McDonnell Douglas* and *Burdine* require a plaintiff to show that there was "an available position for which she was qualified." *Burdine*, 450 U.S. at 253. Accord *McDonnell Douglas*, 411 U.S. at 802. There is no reason why a plaintiff alleging that she was denied a position because of her equal opportunity activity (rather than because of her sex) should be relieved of the burden of making the same showing.

3. There is no conflict between the lower courts' decision in this case and decisions of other courts of appeals. The cases on which petitioner relies (see Pet. 39-40) do not suggest that a plaintiff may recover under Title VII for a retaliatory failure to hire without proving that there was an available position for which she was qualified. In fact, in *Gonzalez* v. *Carlin*, 907 F.2d 573, 578 (5th Cir. 1990), the court affirmed the denial of a claim alleging a retaliatory failure to promote the plaintiff to a particular position on the ground, among others, that the plaintiff had presented no evidence that he was qualified for the job and thus had failed to make out a prima facie case. In *Holland* v. *Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989), the court held that the plaintiff had produced sufficient evidence that her employer had retaliated against her by refusing to keep her job open during her maternity leave after having earlier promised to do so. The effect of the change was to terminate her from her position. As the district court's treatment of the theory petitioner advanced at trial reflects

(see Pet. App. 27a-30a), that type of claim does not require a showing of an available vacancy; the adverse personnel action consists of depriving the plaintiff of the job she already holds.[4] There is no support whatever for petitioner's assertion (Pet. 41) that, in a case involving an allegedly retaliatory failure to hire, "it is settled throughout most of the circuits that the issue * * * whether the vacancy she claimed was truly available * * * is considered as part of the employer's rebuttal rather than the plaintiff's prima facie case."[5]

---

[4] Petitioner cites a number of cases for the proposition that "if a single personnel decision is attacked as both an act of discrimination and an act of reprisal, the two issues are analyzed using differing (and non-overlapping) prima facie cases." Pet. 40. Whatever the validity of that assertion, none of the cases suggest that a retaliatory failure to hire may be shown without evidence of the type petitioner failed to introduce here. Similarly, petitioner suggests that decisions of the Seventh and Ninth Circuits have imposed too high a burden of proof on plaintiffs alleging retaliation. Pet. 36, 43-46. We do not agree that the cases on which petitioner relies commit those circuits to standards at odds with those applied here. In any event, since the standards of which petitioner complains were not applied to her, they provide no support for further review.

[5] In any event, as the district court noted, even if petitioner were deemed to have established a prima facie case, she failed to prove that respondent's reasons for failing to offer her a clerical position were pretextual. See Pet. App. 41a.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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No. 90-1506

In The Supreme Court of the United States

October Term, 1990

Kathleen Shetler Globus, Petitioner

v.

Samuel F. Skinner, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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June 4, 1991

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Introduction.

The agency's assertion that the Fifth and Seventh Circuit cases we cite[1] do not apply different standards to the reprisal prima facie case than do the D.C. Circuit and Eleventh Circuit cases results from simply misreading the cases. Once the fog of confusion is dissipated, the contrast between the cases is impossible to miss.

Although the agency asserts that the D.C. cases can be squared with *McDonnell Douglas Corp. v. Green*, 411 U.S. 793 (1973), it does not deny that the Fifth and Seventh circuit cases better respect the relative conveniences of production of evidence.

---

[1] *Gonzalez v. Carlin*, 907 F.2d 578 (5th Cir. 1990), and *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989).

The agency's suggestion that affirmance would be proper on the ground that any prima facie case was rebutted by the agency at trial is wholly without support in the record.

1. Read carefully, the decisions reveal an inter-circuit conflict.

Issue is joined on whether the D.C. circuit's definition of a retaliation prima facie case, *Williams v. Boorstin*, 663 F.2d 109 (D.C.Cir. 1980), conflicts with the definition applied in the Fifth Circuit and Seventh Circuit, *Gonzalez v. Carlin*, 907 F.2d 578 (5th Cir. 1990), and *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989). Pet. at 39-42; Opp. at 7.

The parties agree that in the D.C. Circuit (and the Eleventh Circuit) the

elements of a retaliation prima facie case are the same as those of a simple discrimination prima facie case, substituting evidence of protected activity followed by an adverse decision for the element of membership in a protected group. Thus, if the claim is retaliation in failing to select the plaintiff for a particular position, the elements are:

1a) proof of protected activity;

1b) proof of adverse decision;

1c) proof of temporal relation;

2) proof of basic qualifications for job;

3) proof that the job was being filled.

Williams v. *Boorstin*, 663 F.2d 109 (D.C.Cir. 1980); *Mitchell* v. *Baldridge*, 759 F.2d 80 (D.C.Cir. 1985); *Canino* v. *United States EEOC*, 707 F.2d 468 (11th Cir. 1983).

The agency disputes our contention that in *Holland* and *Gonzalez* the courts considered only elements 1a, 1b, and 1c at the prima facie case stage, leaving all possible reasons for the employer's decision to be dealt with at the rebuttal and sur-rebuttal stages. The importance of the question impels the use of care in reading the cases.

The agency summarizes the holding in *Gonzalez* as being that, for lack of qualifications, the plaintiff failed to make out a prima facie case of retaliation. Opp. at 7. The agency simply misreads the decision. The paragraph beginning on the bottom of the left hand column on 907 F.2d 578 concludes that because of "lack of requisite qualifications . . . Gonzalez did not establish a prima facie case

of national origin discrimination."

Then comes a paragraph which assumes that Gonzalez did make out "a prima facie retaliation case," and analyses the qualification evidence as rebutting the presumption created by that prima facie case. (Underlining added in both quotations.):

> Assuming *arguendo* that Gonzalez made out a prima facie retaliation case, the fact that he failed to qualify for the position in question rebutted any presumption of retaliation and constituted a reasonable, nondiscriminatory reason for the Postal Service's rejection of his application. Moreover, we cannot find in the record any evidence demonstrating pretext on the part of the Postal Service.

907 F.2d at 578.

Thus, the agency's assurance to this Court that the *Gonzalez* reprisal prima facie case included more than protected activity followed reasonably shortly by

an adverse decision, resulted from a simple failure to see that the court treated the reprisal and the simple discrimination claims differently.

It is also clear that Mr. Gonzalez would have failed to make a prima facie case of reprisal had his suit been tried by D.C. circuit rules. His failure to prove during his case in chief all the elements of a comparable simple race discrimination prima facie case would have freed the employer from even having to assert the true reason for the adverse decision, and would have barred him from ultimately prevailing by showing that the articulated reason was a mere pretext for reprisal.

The agency's mistake in *Holland* is even more puzzling than its misreading of

Gonzalez. The issue is whether the *Holland* court, like the D.C. Circuit, requires all the elements of a comparable simple discrimination prima facie case to be proven as part of a reprisal prima facie case, or whether it suffices for prima facie purposes to prove protected activity followed shortly by an adverse decision.

Holland involves two different jobs. The agency plausibly construes the claim with respect to the first job as being retaliatory discharge. Opp. 7-8. The prima facie case of simple discriminatory discharge includes proof that the plaintiff was meeting the employer's legitimate performance expectation. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). In *Holland*, in contrast, prima

facie reprisal was found without any reference to the quality of the plaintiff's performance, solely on the basis of protected activity followed by adverse decision. 883 F.2d at 1313-6.

The second job at issue in *Holland* was one the plaintiff had never held. She was, in effect, an unsuccessful applicant for it. In a simple discrimination case, or a reprisal case in the D.C. circuit, the plaintiff's prima facie case includes proof that she was qualified for the vacancy. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The *Holland* court did not consider her qualifications when assessing her prima facie case, however; prima facie reprisal was found as with respect to the first position. 883 F.2d at 1313-6. Qualifications were addressed, not as

part of the prima facie case analysis, but in the rebuttal and sur-rebuttal phase. 883 F.2d at 1316.

In sum, the agency errs in denying *Holland* and *Gonzalez* treated only at the rebuttal stage issues which would, under the D.C. and Eleventh Circuit cases, be elements of the reprisal prima facie case.

On the other hand, Ms. Shetler would assuredly made out a prima facie case if judged by the *Holland* or *Gonzalez* courts. Indeed, she not only made out a complete prima facie case of reprisal, she brought into clear focus the question of why the clerical job was not offered her. Among other things, she proved:

* The agency policy was to offer vacancies in lieu of separation (Pet.17);

* The agency offered at least twelve other employees vacancies in lieu of separation (and no hiring freeze exemptions are recorded) (Pet. 23-4);

* Several of the vacancy offers made to other employees were comparable in grade spread to that at issue here (Ibid.);

* The existence of the vacancy was conceded (Pet. 20);

* The vacancy was comparable to the typing job she was offered and she accepted in the 1982 RIF (before the abolition of her job was cancelled)(Pet.8);

* Evidence of Ms. Shetler's typing skills was in her record (App. 21a);

* The only vacancies the agency failed to abolish were those which were high priority positions (App. 54a);

* Neither of the personnel freezes was facially applicable to RIF placements (Pet. 20-2).

There can be no doubt that the *Holland* and *Gonzalez* courts would have, long before this point, placed on the agency the burden of coming forth with a nondiscriminatory explanation for not offering the vacancy to Ms. Shetler.

There is, then, a conflict between the D.C. and Eleventh Circuits, on the one hand, and the Fifth and Seventh Circuits, on the other.[2]

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[2] The agency ambiguously denies that *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985), and *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986), "commit those circuits to standards at odds with those applied here." Opp. at 8 n. 4. What the agency appears to mean that twenty-seven years of title VII litigation (eighteen of them since *McDonnell Douglas*) have left the circuits uncommitted as to what standards govern reprisal cases. That is an argument for, not against, this Court using this case to rule (a) whether presumptions can be created in reprisal cases at all and, if so, (b) what the elements of a reprisal prima facie case are.

2. The agency fails to even address the reason presumptions are created or the different effects of various standards, and so cannot argue that the D.C. standard best achieves the objectives of *McDonnell Douglas*.

The lower courts have evolved three different standards for determining the prima facie case of reprisal: that applied in the D.C. and Eleventh circuits, that exemplified by *Gonzalez* and *Holland*, and that exemplified by *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985), and *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986). That is to say, on an issue never addressed by this Court, conscientious, competent judges disagree as to which standard best applies the *Mc-*

Donnell Douglas standard to reprisal cases.

The agency argues that if there is an inter-circuit conflict, it should not be resolved, because that the standards applied by the D.C. circuit are consistent with the *McDonnell Douglas* framework, Opp. 7. The agency does not deny, however, that the easier standard we argue for would protect employers from trial in frivolous cases while better respecting the relative conveniences of production of evidence than does the standard the agency argues for.[3] Pet. at 50-63. Indeed, the agency treats as an

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[3] In any event, general consistency with the basic rule is no objection to certiorari review when the cases in conflict also are generally consistent with it. If the D.C. circuit held that proof of nine years unexplained absence was necessary to create a presumption of death, this Court would review the conflict with the seven year cases notwithstanding that the longer unexplained absence is more suggestive of death than the shorter.

irrelevancy the whole question of what objectives are served by the *McDonnell Douglas* prima facie case, and how those objectives can be best achieved in the reprisal category of cases. Since, as the D.C. Circuit has itself acknowledged, "Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decision-makers," *Cuddy v. Carmen*, 694 F.2d 853, 856 (D.C. Cir. 1982), this Court should be loath to unnecessarily postpone the point at which the employer is obliged to come forward and reveal what was in the decision-makers' minds.

3. The case for certiorari is not weakened by the agency's unsupported suggestion of alternate grounds for affirmance.

At the very end of its brief, the agency inserts a one-sentence footnote suggesting it would be wasteful to grant certiorari to resolve the prima facie case issue since the district court had found that Ms. Shetler "failed to prove that respondent's reasons for failing to offer her a clerical position were pretextual. See Pet. App. 41a." Opp. at 8 n. 5. As set out in our petition, the agency in fact had not introduced evidence to support the existence of any of the reasons identified by the district court as rebuttal. Pet. 24-27. It is presumably for this reason that the court of appeals limited its affirmance regard-

ing the clerical vacancy "solely on the ground that appellant failed to establish a *prima facie* case concerning availability of such a position." App. 1a-2a. The agency should have followed here the same course it did at the court of appeals: foregoing the defense of the indefensible.

There is nothing in the record of this case which would make it unsuitable as a vehicle for this Court's resolving the conflict over what constitutes a prima facie case of reprisal.[4]

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[4] The agency says at the beginning of its argument that the issue of failure to be offered a vacancy was belatedly injected into the case through Ms. Shetler's motion to alter judgment, Opp. at 4. Since the agency does not specify this as a basis for denying the certiorari petition, we content ourselves with assuring this Court that not only was the wrongful failure to offer her a vacancy alleged in the original complaint, but both parties addressed the issue in their trial briefs and in their arguments over proposed findings of fact and conclusions of law.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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